

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, )  
                                )  
                                Plaintiff )  
                                vs                      ) 16-CR-254  
                                )  
DAVID D. KLEPADLO,         )  
                                )  
                                Defendant )  
                                )  
                                )

TRANSCRIPT OF PROCEEDINGS  
SENTENCING OBJECTIONS  
BEFORE THE HONORABLE A. RICHARD CAPUTO  
MONDAY, SEPTEMBER 30, 2019; 10:00 A.M.  
WILKES-BARRE, PENNSYLVANIA

FOR THE GOVERNMENT:

MICHELLE OLSHEFSKI, ESQ.  
Assistant United States Attorney  
P.O. Box 309  
235 N. Washington Avenue  
Scranton, Pennsylvania 18503

-AND-

WARREN M. HARRELL, ESQ.  
U.S. Environmental Protection Agency  
1650 Arch Street  
Philadelphia, Pennsylvania 19103

FOR THE DEFENDANT:

MARK B. SHEPPARD, ESQ.  
Klehr Harrison Harvey Branzburg LLP  
1835 Market Street, Suite 1400  
Philadelphia, Pennsylvania 19103

-AND-

TIMOTHY J. BERGERE, ESQ.  
Montgomery, McCracken, Walker & Rhoads, LLP  
1735 Market Street, 21st Floor  
Philadelphia, Pennsylvania 19103-7506

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KRISTIN L. YEAGER, RMR, CRR  
CERTIFIED REALTIME REPORTER  
235 N. WASHINGTON AVENUE  
SCRANTON, PENNSYLVANIA 18503

10:05AM 1 THE COURT: As far as today's sentencing concerned, there  
10:05AM 2 are multiple objections that need to be resolved, and frankly,  
10:05AM 3 there's a lot of documents that have come along lately. So what  
10:05AM 4 we're going to do today is we will deal with the objections and  
10:05AM 5 we're going to reschedule this sentencing for another day.

10:05AM 6 But we will deal with the objections, and we will see where  
10:05AM 7 we are at the end of that. I may or may not make a ruling on  
10:05AM 8 that now or issue an opinion regarding same. I don't know which  
10:05AM 9 way we're going to go. This hearing will determine where we are  
10:05AM 10 at that point. Okay?

10:05AM 11 MR. SHEPPARD: Yes, Your Honor.

10:05AM 12 THE COURT: There is two sentencing memoranda, a  
10:05AM 13 Pre-Sentence Report regarding this offense, one on  
10:06AM 14 behalf -- one regarding Mr. Klepadlo and the other the  
10:06AM 15 corporation, and there have been a variety of documents  
10:06AM 16 submitted, the sentencing memoranda also I received, but  
10:06AM 17 there's a Board Resolution of Greenfield Township Sewer  
10:06AM 18 Authority. Does everybody have a copy of that?

10:06AM 19 MR. SHEPPARD: I received it this morning, Your Honor?

10:06AM 20 THE COURT: As did I.

10:06AM 21 MS. OLSHEFSKI: Yes, Your Honor.

10:06AM 22 THE COURT: So let's deal with the objections that have been  
10:06AM 23 filed.

10:06AM 24 Essentially, the major objection is the question involving  
10:07AM 25 Paragraph 24 of the Pre-Sentence Report, which is the inclusion

10:07AM 1 of the enhancement for toxic substances, and I'll hear from  
10:07AM 2 counsel Mr. Sheppard regarding their position.

10:07AM 3 MR. SHEPPARD: Yes, good morning, Your Honor. Mark Sheppard  
10:07AM 4 on behalf of David Klepadlo. With me is my co-counsel Tim  
10:07AM 5 Bergere and the newly admitted Ms. Lowry.

10:07AM 6 Your Honor, if I may, just as a matter of housekeeping, we  
10:07AM 7 got the amended PSR, I guess, late Thursday or Friday. There is  
10:07AM 8 just two factual corrections that I have spoken with the  
10:07AM 9 Probation Officer about, I'd like to get it on the record, just  
10:07AM 10 so we have a clean record with regard to that.

10:07AM 11 Your Honor, I would direct the Court to Paragraph 62 on  
10:08AM 12 Page 15 of the amended PSR.

10:08AM 13 THE COURT: All right.

10:08AM 14 MR. SHEPPARD: Your Honor, there, there's a paragraph at the  
10:08AM 15 bottom that relates to the income of the Defendant's business,  
10:08AM 16 David D. Klepadlo and Associates, which also has pled guilty to  
10:08AM 17 the one count of filing false statements.

10:08AM 18 Your Honor, I simply wish to point out that the income  
10:08AM 19 numbers that are reported there are gross income numbers. I  
10:08AM 20 confirmed that with Mr. Zdaniewicz, and, Your Honor, the net  
10:08AM 21 income number for 2017, which reported a gross amount of  
10:08AM 22 \$67,116, was actually \$5240, based upon the tax return that was  
10:08AM 23 filed.

10:08AM 24 And, Your Honor, they're not stated there, but in 2018, the  
10:09AM 25 Defendant reported gross income through his business of \$12,000

10:09AM 1 and reported a net loss of \$8,000. And as noted in the  
10:09AM 2 objections, which were attached to the addendum, Your Honor,  
10:09AM 3 that was primarily as a result of the fact that the consulting  
10:09AM 4 business, David Klepadlo and Associates, voluntarily  
10:09AM 5 relinquished -- Mr. Klepadlo voluntarily relinquished his  
10:09AM 6 Certificate to be a Sewage Treatment Plant Operator, pursuant  
10:09AM 7 to the plea agreement, and, therefore, lost all four of the  
10:09AM 8 contracts that he had. So there was very limited income coming  
10:09AM 9 into the business, and I wanted to point that out.

10:09AM 10 The other objection, Your Honor, that factually needed to  
10:09AM 11 be resolved is with regard to Paragraph 63 on the next page,  
10:09AM 12 which is the Defendant's Statement of Assets. This is just a  
10:09AM 13 typographical error, and I apologize to Mr. Zdaniewicz because  
10:09AM 14 I didn't point it out sooner, the asset numbers there and also  
10:09AM 15 the income numbers there, Your Honor, are numbers for Mr.  
10:10AM 16 Klepadlo's entire household, both he and his wife.

10:10AM 17 You would note, Your Honor, that on the income numbers,  
10:10AM 18 there's actually a line item for Linda Klepadlo's income at the  
10:10AM 19 top of Page 17.

10:10AM 20 Again, I spoke with the Probation Officer about that this  
10:10AM 21 morning, and he concurs that these are, in fact, numbers for  
10:10AM 22 both Mr. Klepadlo and his wife. Just so the record is clear and  
10:10AM 23 the PSR is accurate, Your Honor. I don't expect that we are  
10:10AM 24 going to ultimately be -- depending where the guideline range  
10:10AM 25 comes out and, ultimately, what the Court decides, with regard

10:10AM 1 to this restitution issue -- it may or may not become a  
10:10AM 2 question of the ability to pay.

10:10AM 3 THE COURT: So the statement that the amounts reflect Mr.  
10:10AM 4 Klepadlo's one-half interest is not so?

10:10AM 5 MR. SHEPPARD: That is correct, Your Honor, it is their  
10:10AM 6 joint interest.

10:10AM 7 THE COURT: All right.

10:10AM 8 MR. SHEPPARD: So I think if you add the word, not, Your  
10:11AM 9 Honor, I think we're good to go.

10:11AM 10 THE COURT: Thank you.

10:11AM 11 MR. SHEPPARD: So those were the only factual objections we  
10:11AM 12 had, Your Honor, to the amended Pre-Sentence Report. And as  
10:11AM 13 Your Honor pointed out, we do have a number of legal objections  
10:11AM 14 to the guideline computation.

10:11AM 15 THE COURT: Let's deal with those.

10:11AM 16 MR. SHEPPARD: Thank you, Your Honor. With regard to the  
10:11AM 17 first issue, as Your Honor pointed out, the issue is the  
10:11AM 18 application of the guideline range here, whether it's 2(q)1.2,  
10:11AM 19 which relates to discharges for toxic and hazardous substances  
10:11AM 20 or 2(q)1.3, which relates to the discharge of a pollutant, in  
10:11AM 21 violation of a permit. Both of these offenses also address the  
10:11AM 22 record-keeping offense to which Mr. Klepadlo and the entity  
10:11AM 23 pled guilty.

10:11AM 24 Your Honor, as we stated in our Sentencing Memo and also in  
10:11AM 25 the objections that were attached to the PSR, it is our

10:11AM 1 position that the proper guideline is 2(q)1.3. And, Your Honor,  
10:11AM 2 the reason that it's important is it's a base offense level of  
10:12AM 3 6 versus a base offense level of 8 for the toxic and hazardous  
10:12AM 4 substance.

10:12AM 5 Your Honor, the argument that we have set forth is,  
10:12AM 6 essentially, that the Court needs to look to the count of  
10:12AM 7 conviction in deciding the guideline range, and that the  
10:12AM 8 statutory basis and the basis for the plea here, Your Honor,  
10:12AM 9 is, essentially, that Mr. Klepadlo and the company have pled  
10:12AM 10 guilty to filing false statements relating to the failure to  
10:12AM 11 properly test daily for the items at the two plants, DO and pH.  
10:12AM 12 And, also, at Benton Nicholson, I believe it was just pH.

10:12AM 13 Your Honor, it is our position that when you look at the  
10:12AM 14 count of conviction here, you're talking about a discharge from  
10:12AM 15 a sewage treatment plant, in violation of a permit because the  
10:12AM 16 testing was not done, which does not, Your Honor, equate to the  
10:12AM 17 discharge of a toxic or hazardous substance.

10:12AM 18 Your Honor, we would also make the argument under the Clean  
10:13AM 19 Water Act, in response to the Government's position that  
10:13AM 20 ammonia is a hazardous or toxic substance, that, number one,  
10:13AM 21 under the Clean Water Act itself, which is the offense to which  
10:13AM 22 he has pled guilty, ammonia is listed as a pollutant and not a  
10:13AM 23 toxic or hazardous substance.

10:13AM 24 With regard to sewage treatment plants, themselves, we  
10:13AM 25 argue that in every single case that we found, reported or

10:13AM 1 unreported in the country, that involved the discharge of  
10:13AM 2 sewage from a sewage treatment plant, 2(q)1.3 was the guideline  
10:13AM 3 that was applied.

10:13AM 4 And, Your Honor, the reason for that, we submit, is that  
10:13AM 5 with regard to municipal waste, and, in particular, the  
10:13AM 6 municipal waste that came from these two rather small plants,  
10:13AM 7 ammonia and ammonia nitrogen -- and we do have Mr. Long here  
10:13AM 8 who can testify to this -- Your Honor, are natural components  
10:13AM 9 of sewage treatment. This is not a situation where you had a  
10:14AM 10 discharge where someone was pouring ammonia into a stream or  
10:14AM 11 that you were discharging from a toxic plant or that you were  
10:14AM 12 discharging from a commercial plant.

10:14AM 13 Your Honor, the three cases that the Government relies  
10:14AM 14 upon, we believe, are inapposite. One of them relates to lead  
10:14AM 15 paint being discharged into a river. I don't think anyone is  
10:14AM 16 going to argue that that's a toxic substance.

10:14AM 17 The other two, Your Honor, one related to discharges from a  
10:14AM 18 slaughterhouse involving chicken processing. Again, I don't  
10:14AM 19 believe anyone is going to argue that discharges from a chicken  
10:14AM 20 slaughterhouse would involve toxic substances.

10:14AM 21 Here, Your Honor, we have a naturally-occurring component  
10:14AM 22 of sewage treatment, every single sewage treatment plant in the  
10:14AM 23 country, big or small, discharges ammonia nitrates or ammonia  
10:14AM 24 nitrogen, and, therefore, Your Honor, to say that this offense  
10:14AM 25 should be subject to the guideline which is reserved for the

10:15AM 1 most serious and hazardous and toxic discharges is a  
10:15AM 2 substantial overstatement, and it overstates, frankly, the  
10:15AM 3 seriousness of this offense.

10:15AM 4 Particularly, Your Honor, where we are talking about a  
10:15AM 5 record-keeping violation, where Mr. Klepadlo has pled guilty to  
10:15AM 6 the failure to monitor and oversee the proper testing at these  
10:15AM 7 two facilities.

10:15AM 8 Your Honor, I would refer, also, to our memoranda, where we  
10:15AM 9 cite a number of cases, at least, nine or ten separates places  
10:15AM 10 where 2(q)1.3 was applied involving a sewage treatment plant or  
10:15AM 11 the discharge of sewage, both either raw sewage or even treated  
10:15AM 12 sewage. Again, Your Honor, that's an important point here. We  
10:15AM 13 are talking about treating sewage coming out of these plants.  
10:15AM 14 These are not untreated discharges.

10:15AM 15 So, again, Your Honor, under the Clean Water Act and, also,  
10:15AM 16 given that we're talking about these sewage treatment plants,  
10:16AM 17 we submit 2(q)1.3 is the proper guideline range.

10:16AM 18 THE COURT: All right. Counsel.

10:16AM 19 MR. HARRELL: Good morning, Your Honor. My name is Warren  
10:16AM 20 Harrell, I'm a Special Assistant United States Attorney from  
10:16AM 21 the United States Environmental Protection Office in  
10:16AM 22 Philadelphia.

10:16AM 23 There's truly a question of law, here, to begin with. Is  
10:16AM 24 ammonia a hazardous substance? The permits, in this case -- and  
10:16AM 25 I'm pretty confident I agree with Mr. Sheppard --

10:16AM 1 THE COURT: I don't mean to interrupt you, but is there a  
10:16AM 2 distinction between hazardous and toxic?

10:16AM 3 MR. HARRELL: Yes. It's not a toxic water pollutant, I agree  
10:16AM 4 with Mr. Sheppard, it's been listed under the different section  
10:16AM 5 of the Clean Water Act Section 311 as a hazardous substance.  
10:16AM 6 It's on the list of hazardous substances in 40 CFR 302.4, I  
10:16AM 7 believe is the correct cite, we have it in our sentencing memo.

10:17AM 8 So the legal question really is, is ammonia a hazardous  
10:17AM 9 substance or isn't it? If it's a hazardous substance, then,  
10:17AM 10 2(q)1.2 applies if the offense conduct in this case and the  
10:17AM 11 relevant conduct involved the discharge of ammonia.

10:17AM 12 If you look at the indictment, the wide-ranging conspiracy  
10:17AM 13 that was alleged in Count 1 and all the substantive Clean Water  
10:17AM 14 Act charges have to do with, among other things, not taking  
10:17AM 15 daily or weekly composite samples at both plants. Composite  
10:17AM 16 samples were required for ammonia nitrogen.

10:17AM 17 Failure to operate the plant. We have a witness from DEP  
10:17AM 18 who would talk about the effects of improper operation and the  
10:17AM 19 actual discharge of these pollutants into the receiving waters  
10:17AM 20 in this case at Greenfield and the tributary of Dundaff Creek.

10:17AM 21 So, legally, ammonia is a hazardous substance. The factual  
10:17AM 22 question of whether it applies in this case, as we believe it  
10:17AM 23 does, because the permit required the monitoring for ammonia  
10:18AM 24 nitrogen, ammonia nitrogen was being discharged from the plant,  
10:18AM 25 it wasn't being totally removed by the treatment system, and

10:18AM 1 whether the plant was discharging treated wastewater is a core  
10:18AM 2 question that the parties disagree about because, you don't  
10:18AM 3 show up for 116 days out of a little bit more than six months,  
10:18AM 4 to actually have a human being at the plant, it's not going to  
10:18AM 5 run properly.

10:18AM 6 So that's the Government's position.

10:18AM 7 THE COURT: So is there disagreement about whether or not  
10:18AM 8 ammonia nitrate was a discharged or not? Is there agreement  
10:18AM 9 about that?

10:18AM 10 MR. SHEPPARD: Your Honor, we are in agreement with that.  
10:18AM 11 It is a permanent substance that is always discharged from  
10:18AM 12 every sewage treatment plant. What we disagree about is whether  
10:18AM 13 or not there were any exceedances, other than the ones our  
10:18AM 14 client actually recorded, with regard to ammonia. And, Your  
10:18AM 15 Honor, there is no evidence of any exceedances beyond the  
10:19AM 16 permitted limits. The permits themselves, Your Honor, allow for  
10:19AM 17 the discharge of ammonia nitrogen. They allow two different,  
10:19AM 18 depending on the time of year.

10:19AM 19 Your Honor, our position is that the offense of conviction  
10:19AM 20 here, the failure to oversee the proper testing and the  
10:19AM 21 submission of false reports. Again, Mr. Klepadlo has not pled  
10:19AM 22 guilty to a substantive violation here. This is a  
10:19AM 23 record-keeping violation, and that was negotiated as part of  
10:19AM 24 the plea agreement.

10:19AM 25 So, Your Honor, we don't disagree that ammonia nitrogen was

10:19AM 1 discharged, what we disagree about, Your Honor, is that it was  
10:19AM 2 never discharged in any kind of harmful or dangerous amounts.  
10:19AM 3 There is no evidence that there was any discharge in violation  
10:19AM 4 of the permitted limits here.

10:19AM 5 So, Your Honor, our position is -- and I would cite the  
10:19AM 6 Court specifically to --

10:19AM 7 THE COURT: Before you do that, let me get this straight. So  
10:19AM 8 what we're saying -- what everyone is saying here is it was  
10:19AM 9 discharged, but we don't know if there were any violations in  
10:20AM 10 the discharge amount or intensity, because these tests or  
10:20AM 11 records were not kept? Is that right? Am I phrasing that  
10:20AM 12 properly?

10:20AM 13 MR. HARRELL: Yes, Your Honor. I would say it's impossible  
10:20AM 14 to know if things were being discharged illegally, because he  
10:20AM 15 wasn't doing the required testing and then lying to the DEP  
10:20AM 16 about making up results.

10:20AM 17 THE COURT: But we're going a step further, aren't we? We're  
10:20AM 18 saying, because those tests weren't done, you're concluding  
10:20AM 19 that it was a violation, in terms of the amount that was  
10:20AM 20 discharged?

10:20AM 21 MR. HARRELL: It was a violation of the permit not to do the  
10:20AM 22 sampling. An effluent limit -- a numerical limit in the permit  
10:20AM 23 is no different kind of permit requirement than the requirement  
10:20AM 24 to do sampling, the required requirement to do operation and  
10:21AM 25 maintenance, the requirement to honestly report data. They're

10:21AM 1 all core ingredients of the permit.

10:21AM 2 So the substantive violation here is not doing the

10:21AM 3 sampling, lying about the sampling, and I would just point out

10:21AM 4 that Mr. Long, the Defendant's expert, in his report, relies on

10:21AM 5 DEP sampling that was done at both plants between 2012 and

10:21AM 6 2016, which is only seven samples over a little bit more than

10:21AM 7 four years. Three of those seven samples showed exceedances of

10:21AM 8 the instantaneous max for ammonia.

10:21AM 9 So to say there's no evidence of illegal discharges is not

10:21AM 10 accurate.

10:21AM 11 MR. SHEPPARD: Your Honor, if I may respond, and then same

10:21AM 12 going to ask Mr. Bergere to respond to the last point because

10:21AM 13 it's an important one.

10:21AM 14 First off, Your Honor, under 1(b)1.2(a) of the guidelines,

10:21AM 15 the guidelines require that the count of conviction, not the

10:21AM 16 relevant conduct, be used to determine the offense guideline.

10:22AM 17 That is clear. What they're talking about here -- first off, I

10:22AM 18 don't agree that's relevant conduct for this offense, but

10:22AM 19 assuming that it is, you still need to look to the count of

10:22AM 20 conviction to make the determination under 1(b)1.2(a) of what

10:22AM 21 is the proper guideline range .

10:22AM 22 Your Honor, the offense of conviction, the statutory or the

10:22AM 23 factual basis for the plea was all about Mr. Klepadlo as a

10:22AM 24 responsible officer failing to oversee his employee, a

10:22AM 25 Certified Treatment Plant Operator to do the proper testing.

10:22AM 1 That's what he admitted to, as far back as 2013, to DEP, it's  
10:22AM 2 what he admitted to to Mr. Wetland and Mr. Burgess, when they  
10:22AM 3 interviewed him in 2015, even before these charges were filed,  
10:22AM 4 and that's why he pled guilty. What he hasn't pled guilty to is  
10:22AM 5 the substantive offenses that Mr. Harrell was talking about.

10:23AM 6 And under the guidelines, as a matter of law, you must look  
10:23AM 7 to the count of conviction, unless there was a specific  
10:23AM 8 stipulation to a guideline range, and, clearly, Your Honor,  
10:23AM 9 that is not what occurred here. So that is one point, Your  
10:23AM 10 Honor. I would cite the case Watterson v. United States. It's  
10:23AM 11 on Page 10 of our sentencing memo.

10:23AM 12 The second point, Your Honor, is the argument that Mr.  
10:23AM 13 Harrell makes about ammonia exceedances is just a little  
10:23AM 14 misleading, because under the permit, Your Honor -- and Mr.  
10:23AM 15 Bergere can explain this better than I can -- but under the  
10:23AM 16 permit, Your Honor, this was a weekly composite sample of  
10:23AM 17 ammonia that was supposed to be conducted, again, it was not  
10:23AM 18 the daily sampling to which my client admitted they didn't do.

10:23AM 19 And, Your Honor, what they're talking about is an  
10:23AM 20 instantaneous max, which is a grab sample, and that is  
10:23AM 21 different from the sample that was required under the permit.

10:24AM 22 And Mr. Bergere can address that, Your Honor.

10:24AM 23 MR. BERGERE: Your Honor, that is fundamentally correct. The  
10:24AM 24 permit, actually, has two limits for ammonia. There's a loading  
10:24AM 25 on the screen that is calculated at the monthly average, and

10:24AM 1 the composite samples are taken weekly to determine whether  
10:24AM 2 there's been an exceedance of monthly average. A grab sample  
10:24AM 3 doesn't determine that. In fact, the limits under the permit  
10:24AM 4 are less than the EPA and World Health Organization limits for  
10:24AM 5 human exposure and drinking water, the limits of these permits.

10:24AM 6 So they don't translate to any kind of environmental harm  
10:24AM 7 in the screening, which is the larger focus of Mr. Long's  
10:24AM 8 testimony. He's focused more on, were these little exceedances  
10:24AM 9 here and there a number of which were self-reported and which  
10:24AM 10 were not untypical as grab samples of wastewater treatment  
10:24AM 11 plants, did they cause environmental harm?

10:24AM 12 It's kind of like charging -- asking for an enhancement for  
10:24AM 13 a bank robber because he had gasoline in his tank in his  
10:25AM 14 get-away car and gasoline has benzene in it, so let's do an  
10:25AM 15 enhancement because there's hazardous substances in his vehicle  
10:25AM 16 and they came out in the exhaust.

10:25AM 17 Treatment plants operate all the time -- this is not a  
10:25AM 18 manufacturing plant, they don't bring ammonia there, they don't  
10:25AM 19 emit it, except in connection with the operation of the  
10:25AM 20 treatment plant. And there's no samples that have been provided  
10:25AM 21 that establish harm, even though, every once in a while, there  
10:25AM 22 may have been an occasional exceedance with a grab sample,  
10:25AM 23 which is not part of the loading and determination as to  
10:25AM 24 whether there's any environmental harm involved from the  
10:25AM 25 emission of or discharge of ammonia.

10:25AM 1 And the flow. The flow at this treatment plant is -- this  
10:25AM 2 permit has authorized 140,000 gallons a day, the plant  
10:25AM 3 discharges a fraction of that, perhaps, 40 at most, 60 percent  
10:25AM 4 of that. So there's almost no chance -- in fact, the expert  
10:25AM 5 would tell you -- there isn't a chance that the plant could  
10:25AM 6 have exceeded any of the in-stream values that are set forth in  
10:25AM 7 the permit.

10:25AM 8 THE COURT: All right.

10:26AM 9 MR. HARRELL: Your Honor, I'll just try not to repeat what I  
10:26AM 10 said before, but the question you posed is whether 2(q)1.2  
10:26AM 11 applies to this case. The question of harm is the guided  
10:26AM 12 departure issue, which is down the road in the guidelines  
10:26AM 13 analysis, but ammonia is a hazardous substance. The plant was  
10:26AM 14 authorized to discharge ammonia within certain limits.

10:26AM 15 There's no question, no dispute that you heard that ammonia  
10:26AM 16 was discharged here, and their sampling shows that there were  
10:26AM 17 ammonia exceedances, and we don't know for many, many, many  
10:26AM 18 days how the plant was operating and whether it was discharging  
10:26AM 19 ammonia in excess of permitted limits, because there was no  
10:26AM 20 sampling being done. Sampling reporting are just as much a  
10:26AM 21 substantive part of the permit as numerical effluent. Thank  
10:26AM 22 you, Your Honor.

10:26AM 23 MR. BERGERE: But as has been pointed out, and as pointed  
10:26AM 24 out in the papers, 2(q)1.3 is the one that's typically applied  
10:26AM 25 in sewage cases, because the Department, EPA and everybody else

10:27AM 1 treats sewage -- it's not -- these as non-conventional  
10:27AM 2 pollutants in wastewater treatment plants, it's not a  
10:27AM 3 manufacturing plant.

10:27AM 4 And the cases where 2(q)1.2 are applied are for industrial  
10:27AM 5 discharges or other kinds of operations, the lead paint that we  
10:27AM 6 talked about, they're really toxic discharges that those  
10:27AM 7 provisions are used for those bad, really a lot of them  
10:27AM 8 unpermitted, completely unpermitted discharges, and EPA is  
10:27AM 9 asking to export that provision to apply to treatment plants,  
10:27AM 10 which it's not done in the past and which the Courts have not  
10:27AM 11 done in the past.

10:27AM 12 THE COURT: All right.

10:27AM 13 MR. SHEPPARD: One more point, Your Honor. That's why,  
10:27AM 14 actually, in the indictment in this case, the Government  
10:27AM 15 alleged discharge of the pollutant ammonia nitrogen in  
10:27AM 16 Paragraph 17 of the indictment.

10:27AM 17 MR. HARRELL: Your Honor, I'll just point out that that's  
10:27AM 18 the statutory element that has to be proven, and so the  
10:27AM 19 indictment tracked the language of the indictment.

10:27AM 20 THE COURT: I would understand that. Is there anything else  
10:27AM 21 on this issue?

10:28AM 22 MR. SHEPPARD: No, I don't believe so, Your Honor, other  
10:28AM 23 than I would just point out that, again, it's the Government's  
10:28AM 24 burden, with regard to showing the application of a particular  
10:28AM 25 guideline and the relevant conduct here. I don't believe they

10:28AM 1 met that burden, again, because we don't believe there's any  
10:28AM 2 evidence, Your Honor, of any discharge here that arises from  
10:28AM 3 the count of conviction, which is the cornerstone and the  
10:28AM 4 touchstone for the determination of proper guidelines.

10:28AM 5 THE COURT: Is there anything else that we want to cover  
10:28AM 6 this morning on the issue of objections? The calculation will  
10:28AM 7 turn on whatever I determine applies, in terms of (q)1.2 or  
10:29AM 8 (q)1.3, I take it?

10:29AM 9 MR. HARRELL: Well, partly, Your Honor. And I guess this  
10:29AM 10 really depends on how far the Court wants to go this morning. I  
10:29AM 11 think the parties agree -- I'm almost afraid to say that -- but  
10:29AM 12 I think the parties agree, Your Honor, that these two  
10:29AM 13 guidelines run parallel to each other, and that the big  
10:29AM 14 difference -- the substantive difference between the two is the  
10:29AM 15 8 versus the 6 starting point.

10:29AM 16 The other issues, Your Honor, in terms of the objections we  
10:29AM 17 have interposed, particularly, whether any of the substantive 1  
10:29AM 18 through 4 enhancements, two of which the Probation Officer and  
10:29AM 19 Government have sought to apply, which we have objected to,  
10:29AM 20 they run parallel in both guideline sections, so the arguments  
10:29AM 21 are essentially the same.

10:29AM 22 So our argument, Your Honor, succinctly stated, at least,  
10:30AM 23 I'll try to be succinct, is that the record-keeping offense to  
10:30AM 24 which Mr. Klepadlo has pled guilty to, there is no substantive  
10:30AM 25 enhancement that should apply. If you look at both guidelines,

10:30AM 1 Your Honor, it says that if the record-keeping offense, which  
10:30AM 2 is very broadly defined in both guidelines as including the  
10:30AM 3 submission of false reports, which is what our client has  
10:30AM 4 admitted to, if it's a record-keeping offense that was intended  
10:30AM 5 to conceal a substantive violation of the permit.

10:30AM 6 For example, if there was a change in the form, a false  
10:30AM 7 number written down to hide an exceedance, then, Your Honor,  
10:30AM 8 the guideline properly says you should apply the substantive  
10:30AM 9 enhancements.

10:30AM 10 In this case, Your Honor, there is no evidence of any  
10:31AM 11 intention by my client to conceal any violation here. In fact,  
10:31AM 12 as I noted earlier, Mr. Klepadlo admitted to the DEP  
10:31AM 13 investigators, who are here and who will testify, and there's a  
10:31AM 14 report, Your Honor, that is attached to somebody's memo, either  
10:31AM 15 theirs or ours, that says my client, as early as 2013, admitted  
10:31AM 16 to the DEP investigators that they did not go to the plant  
10:31AM 17 every day, that they went, in his view and his understanding  
10:31AM 18 was that they were going, at least, a couple times a week,  
10:31AM 19 which meant that they were taking samples a couple times a  
10:31AM 20 week, including the weekly composite samples, which we all  
10:31AM 21 agree are the most important.

10:31AM 22 That's what my client believed in 2013, it's what he  
10:31AM 23 believed in 2015 when he was interviewed by the FBI and the EPA  
10:31AM 24 agents that are assigned to this case. It's the reason why he's  
10:31AM 25 pled guilty. He has admitted that. He said to them, at the

10:32AM 1 time, that, in his view, daily testing of the pH and the DO  
10:32AM 2 were not necessary for the safe treatment of the plant, and  
10:32AM 3 that the pH levels would never vary between the ranges that  
10:32AM 4 were set in the permit, and, Your Honor, that is, in fact, the  
10:32AM 5 case. He also said, Your Honor, that he didn't feel it was  
10:32AM 6 necessary to take all the other daily samples at both plants.  
10:32AM 7 He admitted to that.

10:32AM 8 What he didn't admit to, Your Honor, and what they are  
10:32AM 9 trying to now bring back into the case is that he didn't know  
10:32AM 10 that the sewage treatment plant operator, who they will admit  
10:32AM 11 was primarily assigned to these two plants, was not going with  
10:32AM 12 the frequency that he believed he was.

10:32AM 13 So, in fact, we have this surveillance that shows that Mr.  
10:32AM 14 Sheposh, who was the operator, the certified operator for these  
10:32AM 15 two plants, was not, in fact, going. But, Your Honor, on the  
10:33AM 16 issue of concealment and on the issue of my client's intent,  
10:33AM 17 which is what's important here, there was no effort to conceal  
10:33AM 18 the fact that they were not going to the plant every day. In  
10:33AM 19 fact, the evidence is directly to the opposite.

10:33AM 20 So, Your Honor, in our view, and our argument is that, as a  
10:33AM 21 matter of fact and as a matter of law, the substantive  
10:33AM 22 enhancements of 1 through 4 of each of those guidelines,  
10:33AM 23 whether it's 2(q)1.2 or 2(q)1.3 do not apply, and this is, in  
10:33AM 24 fact, a record-keeping offense, and, therefore, the guideline  
10:33AM 25 range should not be enhanced by either sub 1 or sub 4, which

10:33AM 1 are the continuous discharge in violation of a permit, and No.  
10:33AM 2 4, which is -- I can't remember -- but they both relate to  
10:33AM 3 substantive offenses, again, Your Honor, which are not --

10:33AM 4 THE COURT: So you're talking about Paragraphs 25 and 26?

10:34AM 5 MR. SHEPPARD: Yes.

10:34AM 6 THE COURT: Is that right?

10:34AM 7 MR. SHEPPARD: Yes, Your Honor.

10:34AM 8 THE COURT: Got it.

10:34AM 9 MR. SHEPPARD: I'm sorry, Your Honor. Again, the key is,  
10:34AM 10 under the guidelines, where it's a record-keeping offense,  
10:34AM 11 which is defined in the guidelines, very broadly, clearly  
10:34AM 12 captures the offense conduct here, unless there is evidence of  
10:34AM 13 an intention to conceal, the substantive enhancements that are  
10:34AM 14 sought to be applied by the Government do not apply.

10:34AM 15 THE COURT: All right. Anything you want to say about that?

10:34AM 16 MR. HARRELL: Yes, Your Honor. Whether they sampled two days  
10:34AM 17 a week for daily samples or they sampled two days a month, they  
10:34AM 18 weren't testing every day, as Mr. Sheppard just acknowledged.  
10:34AM 19 Yes, it's true his client admitted to various regulators over a  
10:34AM 20 period of years that he didn't think it was necessary to take  
10:34AM 21 samples every day, that he knew better than what was in the  
10:34AM 22 permit, that he admitted he wasn't taking samples every day,  
10:34AM 23 but he continued to lie on the DMR's he sent to the DEP.

10:35AM 24 They put in sample numbers for every day, he admitted, in  
10:35AM 25 person, that he had failed to comply with the permits

10:35AM 1 requirement for daily testing --

10:35AM 2 THE COURT: Let me get that straight. So you suggest that he  
10:35AM 3 did try to conceal by submitting false samples every day?

10:35AM 4 MR. HARRELL: False results for every month, for days. If  
10:35AM 5 you're not concealing, why make up bogus numbers?

10:35AM 6 THE COURT: Well, that's how you encounter the concealment  
10:35AM 7 argument?

10:35AM 8 MR. HARRELL: Absolutely.

10:35AM 9 THE COURT: Understood.

10:35AM 10 MR. SHEPPARD: Your Honor, may I just briefly respond? Very  
10:35AM 11 briefly. Your Honor, if that's what he did, he didn't do a very  
10:35AM 12 good job of concealing, number one.

10:35AM 13 Number two, Your Honor, the evidence in this case, Mr.  
10:35AM 14 Sheposh wore a wire, he recorded over 50 conversations. The  
10:35AM 15 best evidence of the lack of my client's knowledge is in those  
10:36AM 16 intercepts. When he says to Joe Sheposh, I told them we were  
10:36AM 17 not there every day, and Joe says, Well, I told them we were.  
10:36AM 18 His response is, You did? That's what's on the tape. Your  
10:36AM 19 Honor, there was no he effort to conceal what he has admitted  
10:36AM 20 to.

10:36AM 21 Your Honor, with regard to the DMR's, again, it's Mr.  
10:36AM 22 Klepadlo's name on the door, we get that, he clearly is a  
10:36AM 23 responsible officer, and we understand that, too. But with  
10:36AM 24 regard to his intent to conceal, Your Honor, Joe Sheposh was  
10:36AM 25 the certified operator, he was the one who signed the forms.

10:36AM 1 They were submitted by Mr. Klepadlo as the responsible officer.  
10:36AM 2 That's why we're pleading guilty here. But there was no effort  
10:36AM 3 by my client to conceal anything. That's our argument.

10:36AM 4 MR. HARRELL: Your Honor, if I understand the chronology,  
10:37AM 5 Mr. Sheposh would prepare the DMR, would show a daily sample  
10:37AM 6 for every day of the month. Mr. Klepadlo has admitted that he  
10:37AM 7 knew Mr. Sheposh was not taking daily samples. He wasn't taking  
10:37AM 8 daily samples, but he's still signing a report that has numbers  
10:37AM 9 for daily samples. That's concealment.

10:37AM 10 As for the number of recorded conversations, I think that's  
10:37AM 11 just a difference in somehow counting, because we have a much  
10:37AM 12 lower number, but that's not really relevant to the discussion  
10:37AM 13 on this particular issue.

10:37AM 14 MR. BERGERE: Your Honor, if I might rise on that issue.  
10:37AM 15 The sequence of events is important to understand. Joe Sheposh  
10:37AM 16 was the operator. Joe Sheposh would collect samples, and he  
10:37AM 17 would take them, physically, to the laboratory. The laboratory  
10:37AM 18 would analyze them and put the results on the DMR form at the  
10:37AM 19 laboratory, based on the samples that they received.

10:37AM 20 The Government has the sheets from Microbac Lab, where Joe  
10:38AM 21 Sheposh dropped them off, he relinquished control of them  
10:38AM 22 there. Mr. Klepadlo is sitting in his kitchen and on his  
10:38AM 23 computer, the DMR forms show up completed, except for pH. Joe  
10:38AM 24 Sheposh would come to his house, would sit down at his table,  
10:38AM 25 would sign the certification saying, I swear that everything in

10:38AM 1 there is true.

10:38AM 2 As to the Greenfield treatment plant, there was no  
10:38AM 3 requirement to record in the DMR the daily pH's, the only thing  
10:38AM 4 they recorded was a range. On the Benton-Nicholson forms, there  
10:38AM 5 was a daily, because they changed the form, the daily form,  
10:38AM 6 when the permit was renewed.

10:38AM 7 The Greenfield Township permits of 2009 hasn't been renewed  
10:38AM 8 in a decade, but Mr. Sheposh filled those things in. And as he  
10:38AM 9 told the officer, Mr. Sheposh said he recorded those numbers in  
10:38AM 10 his iPad or Notepad, that he filled them out. My client didn't  
10:38AM 11 know that he was filling out all of those numbers, except as to  
10:38AM 12 Benton-Nicholson as to the pH. Those are the days he knew he  
10:38AM 13 wasn't showing up, and he recorded it in a range.

10:39AM 14 In his own mind, the pH didn't vary, because it's ground  
10:39AM 15 water, it's not going to vary anywhere near the permit limits.  
10:39AM 16 In his own mind, that was the risk that he accepted, but all  
10:39AM 17 the other falsifications, Mr. Sheposh was showing up with  
10:39AM 18 samples, the issues we all have is where he was getting them  
10:39AM 19 from, we don't know, but he is responsible for that conduct,  
10:39AM 20 and that's not what we're pleading to.

10:39AM 21 THE COURT: All right.

10:39AM 22 MR. HARRELL: Your Honor, I don't have anything to add.

10:39AM 23 THE COURT: Okay. Anybody want to say anything else? I'll  
10:39AM 24 give you the last word.

10:39AM 25 MR. SHEPPARD: He rises with some trepidation. Your Honor, I

10:39AM 1 know the Court has other things on the schedule here, but there  
10:39AM 2 are, as Mr. Harrell pointed out, two guided departures, that if  
10:39AM 3 the Court were to apply these substantive enhancements under 1  
10:39AM 4 and 4 of the guideline range, it's our argument, in the  
10:40AM 5 alternative, that there should be a two-level decrease, as set  
10:40AM 6 forth in those guidelines, themselves, because of a lack of  
10:40AM 7 environmental harm here and the seriousness or the lack of  
10:40AM 8 seriousness of our client's conduct or, at least, his  
10:40AM 9 intentions.

10:40AM 10 THE COURT: Well, I understand that. I'm not going to  
10:40AM 11 determine that. I'll give you an opportunity to argue that when  
10:40AM 12 we have sentencing.

10:40AM 13 MR. SHEPPARD: And in terms of the guidelines, Your Honor,  
10:40AM 14 those were the objections --

10:40AM 15 THE COURT: All right.

10:40AM 16 MR. SHEPPARD: -- that we had interposed. So those were the  
10:40AM 17 guideline objections.

10:40AM 18 THE COURT: All right. I will take this under advisement,  
10:40AM 19 and we will reschedule -- we will schedule another date for  
10:40AM 20 sentencing. In the meanwhile, I'll determine the issues here  
10:40AM 21 and issue an opinion in short order.

10:41AM 22 MR. SHEPPARD: Thank you, Your Honor.

10:41AM 23 MR. HARRELL: Thank you.

10:41AM 24 THE COURT: Sorry for the inconvenience, but there were so  
10:41AM 25 many documents filed here that I thought this was the best way

10:41AM 1 to handle this. I know everybody has traveled here, and I know  
10:41AM 2 it's expensive, and I apologize for that, but I think, in order  
10:41AM 3 to give it the proper care and treatment that it deserves, this  
10:41AM 4 is the best way to proceed.

10:41AM 5 MR. SHEPPARD: We understand that, Your Honor. And if I may,  
10:41AM 6 sir, just one other point. With regard to the Board resolution  
10:41AM 7 that was received this morning, Your Honor, this is the first  
10:41AM 8 that we have heard there is an issue of restitution here,  
10:41AM 9 though, we have been told that one may be coming.

10:41AM 10 Your Honor, we would like the opportunity to try to address  
10:41AM 11 in the interim, if we may. I think our argument is going to be  
10:41AM 12 very similar, in that, there is no restitution that should flow  
10:41AM 13 from the count of conviction, which, again, under the mandatory  
10:41AM 14 witnesses act --

10:42AM 15 THE COURT: I looked at this this morning. I don't see  
10:42AM 16 any -- I see a lot of whereas clauses, I see no, be it  
10:42AM 17 resolved. So I don't know what this means, so I'll give you an  
10:42AM 18 opportunity to -- I'll give both sides an opportunity to  
10:42AM 19 determine what to do with it. I don't know what to do with it  
10:42AM 20 at the moment.

10:42AM 21 MR. SHEPPARD: Thank you, Your Honor.

10:42AM 22 THE COURT: All right, thank you. Thank you all.

23 (At this time the proceedings were adjourned.)

24

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1 C E R T I F I C A T E  
2

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KRISTIN L. YEAGER, RMR,CRR  
Official Court Reporter  
United States District Court  
Middle District of Pennsylvania  
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